Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 78-115

INLAND OIL & TRANSPORT CO.,
Petitioner,

v.

BROCK ADAMS,
Secretary of Transportation,
ADMIRAL OWEN W. SILER,
Commandant, United States Coast Guard,
and
DRAVO CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

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OPINIONS BELOW

The opinions of the United States District Court for the Eastern District of Missouri and the United States Court of Appeals for the Eighth Circuit in this action, both unreported at this date, are Appendix A and Appendix B hereto.

JURISDICTIONAL STATEMENT

This is a Petition for Writ of Certiorari for review of a judgment of the United States Court of Appeals for the Eighth

Circuit entered April 24, 1978. Petitioner's Petition for Rehearing was denied by the Court of Appeals on May 24, 1978. Jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

QUESTION PRESENTED FOR REVIEW

Is Petitioner's suit for judicial review of the Coast Guard's action in certifying certain barges for the proper carriage of flammable cargoes moot, even though Petitioner remains subject to a risk of substantial injury as a result of the challenged Coast Guard action?

STATUTES

[See Appendix G for text]

46 U.S.C. § 391

Title 52 Rev.Stat. § 4417, as amended Act of December 21, 1898, c. 29, § 4, 30 Stat. 765; Act of Mar. 3, 1905, c. 1454, § 1, 33 Stat. 1023; Act of Mar. 4, 1913, c. 141, § 1, 37 Stat. 736; 1946 Reorg. Plan No. 3, §§ 101-104, eff. July 16, 1946, 11 F.R. 7875, 60 Stat. 1097; Act of June 4, 1956, c. 350, § 1, 70 Stat.

46 U.S.C. § 391a

Title 52 Rev.Stat. § 4417a, as added Act of June 23, 1936, c. 729, 49 Stat. 1889, and amended Act of October 9, 1940, c. 777, § 3, 54 Stat. 1028; 1946 Reorg. Plan No. 3, §§ 101-104, eff. July 16, 1946, 11 F.R. 7875, 60 Stat. 1097, Act of July 11, 1968, Pub.L. 90-397 § 4, 82 Stat. 341; Act of July 10, 1972, Pub.L. 92-340, Title II, § 201, 86 Stat. 427, Act of Nov. 16, 1973, Pub.L. 93-153, Title IV, § 401, 87 Stat. 589; Act of Oct. 1, 1974, Pub.L. 93-430, § 6(3), 88 Stat. 1183.

STATEMENT OF THE CASE

The Commandant of the Coast Guard, pursuant to 46 U.S.C. § 391 and § 391a, has certified four double-skin, integrated tank barges for the carriage of combustible or flammable liquids on the inland waterways of the United States. Prior to the certification, Petitioner Inland Oil and Transport Company ["Inland"] had contracted to purchase the barges from their manufacturer, Dravo Corporation. By the use of X-ray (or radiographic) testing Inland had discovered defects in certain welds on the barges. The Coast Guard ordered these known defective areas repaired, but conducted no X-ray testing to discover other possible defects.[1]

Prior to certification Inland commenced the present action in the Eastern District of Missouri, seeking reversal of the final Coast Guard order refusing to conduct radiographic testing. Inland alleged that the refusal to conduct X-ray testing was a violation of the Commandant's statutory duty to inspect barges and to establish rules and regulations for the protection of the marine environment, and was arbitrary, capricious, an abuse of discretion, not in accordance with law, and unwarranted by the facts. Jurisdiction of the District Court was based on 28 U.S.C. § 1331, the federal question presented being whether the Commandant had performed his statutory duties under 46 U.S.C. § 391 and 46 U.S.C. § 391a.

After the District Court's initial stay of further testing was dissolved on application by Dravo, the Coast Guard granted the required certificates. Dravo tendered the barges to Inland, which rejected them; Dravo then sold the barges to third parties.

Dravo and the government Respondents then moved to dis-

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[1] The opinions of Commander C. E. Pitcock, Captain J. W. Leadbetter, and the Commandant of the Coast Guard are respectively Appendices D, E, and F hereto.

miss, asserting a lack of subject matter jurisdiction, absence of standing on the part of Inland, and mootness. In its Memorandum responding to these motions, Inland pointed out in substance that it is an extensive user of the inland waterways, and that its employees' lives and its property are threatened by the operation of improperly certificated barges for the carriage of flammable liquids on those waterways. Inland said, "An improperly tested and certificated barge exposes Plaintiff to wide ranging economic liability in the event of spillage of hazardous cargo or an explosion." [Court of Appeals Appendix at 63a-64a].

The District Court, ignoring these concerns, dismissed the Complaint, finding a "lack of jurisdiction" and "lack of standing at this time to maintain the action." [Appendix A, at 1].

On appeal, the United States Court of Appeals for the Eighth Circuit affirmed the dismissal, but its decision rested solely on grounds of mootness. The Court found that the certification of the barges and sale to third parties ended the controversy between the parties. Concerning Inland's allegations that operation of improperly inspected barges would affect the safety of its employees and property, the Court said, "We think the possibilities [of injury] put forward by the Plaintiff are too indirect, remote, and conjectural to defeat the claim of mootness." [Appendix B hereto, at 13]. Inland's Petition for Rehearing was denied.

ARGUMENT

The question presented is whether a user of the inland waterways, having knowledge of possible defects in barges certificated for the carriage of flammable liquids, may challenge the action of the Coast Guard in certificating the barges. The Eighth Circuit affirmed the District Court's dismissal on the sole ground that at an earlier point Inland had a greater interest than that of a user in these barges, in that Inland had been a prospective purchaser. This interest as purchaser had terminated on sale of the barges to third parties. The Eighth Circuit's determination that this change in circumstances rendered the lawsuit moot is an arbitrary decision of the Commandant of the Coast Guard which has subjected the marine environment and Petitioner Inland to the risk of serious harm. The Eighth Circuit decision is also contrary to prior decisions of this Court in the important area of mootness.

Not every change of circumstances occurring during a lawsuit renders it moot so as to require dismissal. *Carafas v. LaVallee*, 391 U.S. 234, 237-38, 20 L.Ed.2d 554, 558 (1968); *Sibron v. New York*, 392 U.S. 40, 40-48, 20 L.Ed.2d 917, 927-932 (1968). If there is a continuing Article III case or controversy as to which the court can give effective relief, the action is not moot. *See Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 122, 40 L.Ed.2d 1, 8 (1974).

There remains an Article III case or controversy between these parties. The four barges continue to ply the inland waterways, of which Inland remains an extensive user. Inland has alleged that the operation of the barges creates a substantial risk of harm to it in the form of an explosion or cargo spill. The Coast Guard has the power to stop the barges from operating. since it is charged with a statutory duty to reinspect them every two years. 46 U.S.C. §391a.

These circumstances demonstrate the existence of a " 'definite and concrete' " controversy which " 'touch[es] the legal relations of parties having adverse legal interests' ". *See Du Funis v. Odegaard*, 416 U.S. 312, 317, 40 L.Ed.2d 164 (1974), *citing Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-241, 81 L.Ed. 617 (1937). There is sufficient real adverseness in the interests of the parties to insure that the controversy will be presented to the courts with the vigor necessary to its proper resolution. *See Flast v. Cohen*, 392 U.S. 83, 99, 20 L.Ed.2d 947, 961 (1968).

This is a controversy as to which the courts could afford effective relief. A declaratory judgment that the original inspection was inadequate would affect the Coast Guard's inspections at the two year intervals. A declaration that these procedures were inadequate would also prevent recurrence of certification in subsequent cases of this kind involving other barges. This is truly a case where the "continuing and brooding presence" of the governmental action in granting and reissuing these certificates "may well be a substantial adverse effect on the interests of the petitioning parties." *See Super Tire Engineering Co. v. McCorkle, supra*, 416 U.S. at 125.

The basis for the Eighth Circuit's determination that this action was moot was its conclusion that the hazards alleged by Inland are "too indirect, remote and conjectural to defeat the claim of mootness." This conclusion is baseless.

First, the Court determined that the claim of harm was "indirect, remote and conjectural" at the pleading stage. Inland alleged that operation on the inland waterways of these barges would subject it to a substantial risk of harm. It cannot be determined, on the basis of the pleadings alone, that this risk is so insubstantial as to preclude judicial intervention.

Moreover, the harm to Petitioner here is in fact much greater in magnitude than that which was found by this Court to be sufficient for a case or controversy in *United States v. SCRAP*,

412 U.S. 669, 37 L.Ed.2d 254 (1973). In *SCRAP*, five law students formed an organization to protect the environment. They sued to enjoin enforcement of two Interstate Commerce Commission orders allowing railroads to collect a 2.5% surcharge on interstate freight rates. They alleged that the effect of the surcharge was to discourage the use of recyclable materials with the result that they would be required to pay more for finished products, and that various natural areas which they used for recreation would be adversely affected by increased pollution. This Court held that these allegations were sufficient, if proven, to confer standing on these students to challenge the ICC order. 412 U.S. at 689, 37 L.Ed.2d at 270-71.

Compared to the attenuated relationship between agency action and private harm shown in *SCRAP*, the very real possibility of serious economic and non-economic injury from improper certification is plainly sufficient to defeat any claim that there is not a case or controversy between Inland and the Coast Guard assertable in this action.

The Respondents argued below that there is no case or controversy because there is no certainty that a fire or cargo spill will occur, and will result in injury to Inland. But it is not necessary for Inland to prove the certainty of injury to maintain this action. As Mr. Justice Brennan has stated, referring to *United States v. SCRAP, supra*, "Clearly there is no difference for purposes of Article III standing—personal interest sufficient for concrete adverseness—between a small but certain injury and a harm of a larger magnitude discounted by some probability of its nonoccurrence." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 61 n.10, 48 L.Ed.2d 450, 473 n. 10 (1976) (Brennan, J., dissenting).

Here, Inland has alleged a harm of substantial magnitude, and is prepared to prove a possibility of its occurrence suffi-

cient to insure that adverseness required for a case or controversy.

When the lower federal courts have closed their doors to a litigant on a question of public interest in contravention of the prior decisions of this Court, the case is an appropriate one for this Court's certiorari jurisdiction.

As the Court said in disposing of a similar case in which it had granted certiorari to resolve a question of mootness:

> "In the case now before us, the state action is not at all contingent. Under the petitioners' view of the case, it is immediately and directly injurious to the corporate petitioners' economic positions. Where such state action or its imminence adversely affects the status of private parties, the courts should be available to render appropriate relief and judgments affecting the parties' rights and interest."

Super Tire Engineering Co. v. McCorkle, supra, 416 U.S. at 125.

APPENDIX

CONCLUSION

For the reasons stated, Petitioner Inland Oil and Transport Co. respectfully requests the Court to exercise its certiorari jurisdiction to review the judgment of the Court of Appeals.

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APPENDIX A

In the United States District Court, Eastern District of Missouri, Eastern Division

Inland Oil & Transport Company,
Plaintiff,

vs.

William T. Coleman, Jr., et al.,
Defendants.

No. 76-761C (2)

Order of Dismissal

(Filed May 13, 1977)

This matter is before the Court on motions (1) of defendants Coleman and Siler and (2) of intervening defendant Dravo Corporation to dismiss or for summary judgment.

The Court having fully considered the matter, it is HEREBY ORDERED that said motions to dismiss be and the same are hereby sustained for lack of jurisdiction and for lack of standing at this time to maintain the action; and

IT IS FURTHER ORDERED that this action be and the same is hereby dismissed.

Dated this 13th day of May. 1977.

s/ JOHN K. REGAN
United States District Judge

APPENDIX B

Unitd States Court of Appeals for the Eighth Circuit

No. 77-1629

Inland Oil & Transport Co., Appellant, v. Brock Adams (previously William T. Coleman, Jr.), Secretary of Transportation, Admiral Owen W. Siler, Commandant of the United States Coast Guard, and Dravo Corporation, Appellees.	Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: January 11, 1978

Filed: April 24, 1978

Before Bright, Stephenson and Henley, Circuit Judges.

Henley, Circuit Judge.

This is an action brought in the United States District Court for the Eastern District of Missouri by Inland Oil & Transport Co. (Inland) for the purpose of securing judicial review of an order of the Commandant of the United States Coast Guard, an agency of the United States which at the present time is within the jurisdiction of the United States Department of Transportation, with respect to four metal barges that in 1976 were being built by the defendant Dravo Corporation (Dravo) under contract with plaintiff. The original defendants were the Secretary of Transportation and the Commandant of the Coast Guard, and at times they will be referred to as the federal defendants. After the suit was filed in August, 1976 Dravo was permitted to intervene as a defendant.

The barges were designed for the transportation of liquid chemicals, including combustible, explosive or poisonous substances, on the inland waters of the United States. Before such a vessel may be put into service it must be inspected by the Coast Guard and must be certified as being safe and suitable for use not only from the standpoint of the safety of lives and property but also from the standpoint of marine environment. 46 U.S.C. §§ 391 and 391a.[1] And the vessel must be reinspected every two years.

The order attacked by plaintiff was in effect a determination by the Commandant that "reverse hydrostatic" testing of the barges for integrity of welds was sufficient to justify the Coast Guard in certifying the vessels as required by the statutes that have been mentioned, and that further testing of the welds by radiological means (X-rays) was not required. Plaintiff seeks to have the order nullified and set aside.[2]

---

[1] Section 391 is basically an old statute that was first enacted in 1871 and related to initial and periodic inspections of steam vessels. Such vessels were required to be inspected before being put into service and to be inspected once a year thereafter if they carried passengers and once every two years if they did not carry passengers. Section 391a was first enacted in 1936 and it related to vessels having on board inflammable or combustible liquid cargo in bulk: such vessels were to be deemed to be "steam vessels" for the purposes of § 391 regardless of their means of propulsion. Section 391a was substantially rewritten by the comprehensive Ports & Waterways Safety Act of 1972, Act of July 10, 1972, P.L. 92-340, Title II. 80 Stat. 427 *et seq.*

[2] Subject matter jurisdiction of the district court is based on 28 U.S.C. § 1331(a), as amended. Plaintiff has abandoned an original claim that the judicial review provisions of the Admiinstrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*, afforded a second basis of jurisdiction. *See Califano v. Sanders*, 430 U.S. 99 (1977).

On the same day as that on which the suit was filed plaintiff obtained from the district court, apparently after a hearing at which both the plaintiff and the federal defendants were represented, what amounted to a preliminary injunction which prohibited the Coast Guard from taking any further action with respect to the barges until further order of the court. However, after Dravo had been permitted to come into the case, District (now Senior) Judge John K. Regan sustained Dravo's motion to dissolve the preliminary injunction or stay order. Plaintiff sought no relief from this court with respect to the order of dissolution.

By mid-November, 1976 testing of the barges had been completed, and they had been certified by the Coast Guard as safe and suitable. Dravo tendered the barges to the plaintiff; plaintiff refused to accept them, and they were sold to third parties. The controversy between Inland and Dravo about the barges is now subject to litigation that is pending in the United States District Court for the Western District of Pennsylvania.

In late April, 1977 all of the defendants filed motions to dismiss the complaint, or, alternatively, for summary judgment. On May 13, 1977 Judge Regan entered a short order granting the motions and dismissing the complaint. This appeal followed. We affirm.

Regardless of whether the district court sustained the "motions to dismiss," as such, or the alternative "motions for summary judgment," as such, it is our duty on review to consider the case in the light most favorable to the plaintiff and to accept as true the factual allegations of the complaint.[3] The facts may be stated as follows.

Inland is a Missouri corporation having its principal place of business in St. Louis. It owns and operates barges on the navi-

[3] Unless otherwise indicated, quotations appearing in the following statement of facts will be from the complaint. Other quotations will be from exhibits to the complaint.

gable inland waters of the United States in which barges liquid chemicals are transported in bulk. Some of those chemicals are highly flammable or explosive and some of them are capable of seriously damaging the marine environment if they are spilled or leak out of the barges in which they are being transported. There is no question that such barges are covered by §§ 391 and 391a.

Dravo is a corporation, the business of which includes the manufacture and sale of metal barges of the type or types used by plaintiff. In 1973 Inland and Dravo entered into a contract under the terms of which Dravo undertook to construct and deliver to Inland a fleet of four double hulled metal barges which Inland intended to use in the transportation of methyl alcohol. The contract provided that by the time of delivery each barge would have been inspected and approved by the Coast Guard and would be accompanied by a certificate of the agency to the effect that the barge was suitable for the transportation of a category of liquid chemicals described as "Grade A or lower." Methyl alcohol falls within that category, and the complaint describes the substance as follows: "Methyl alcohol, also known as wood alcohol, is a highly flammable, poisonous, liquid alcohol, formed in the destructive distillation of wood or made synthetically and is used as a solvent, antifreeze, or denaturant for ethyl alcohol and in the synthesis of other chemicals. Methyl alcohol is a liquid of extremely low viscosity and will leak through extremely small holes or cracks in barges."

Exhibit "D" to the complaint is a copy of the final decision of the Commandant. It indicates that in inspecting new barges for certification as being fit for service on the inland waters of the nation it is, or at least was, the practice of representatives of the Coast Guard to use visual inspection of the vessels, including welding work, and to test the vessels by means of air and water tests. Exhibit "D" also indicates that while Dravo was required to furnish Coast Guard inspection certificates along with the vessels, Inland had the right to conduct at its own expense addi-

tional tests, including X-rays of the welds in the hulls of the vessels. This X-ray testing is referred to at times in the record as non-destructive testing.

As of mid-April, 1976 the four barges were nearing completion. The Coast Guard apparently had made some inspections and Inland, as it had a right to do under its contract with Dravo, had caused the welding to be inspected by an employee of Col-X Corporation of Columbus, Ohio, a commercial testing organization. The Col-X representative examined a number of the welds by means of X-rays and found defects. These defects were brought to the attention of Dravo and the Coast Guard by Inland.

On April 19, 1976 a meeting was held in the office of Commander C. E. Pitcock, Commanding Officer of the Coast Guard Marine Safety Office at Pittsburgh. Representatives of Inland, Col-X and Dravo were present. As a result of that meeting, Commander Pitcock issued an order on April 21, 1976 which was expanded to some extent by another order entered on May 28, 1976. Plaintiff describes those orders as follows:

> . . . Commander C. E. Pitcock, Commanding Officer, U. S. Coast Guard, Marine Safety Office, Pittsburgh, Pennsylvania, by orders dated April 21, 1976 and May 28, 1976 (Exhibits A and B attached hereto and made a part hereof), instructed Dravo that prior to certification all rejected areas determined by the radiographs were to be excavated to sound material and repaired using good marine practice. He further instructed Dravo that certain areas of the said barges were to be given additional NDT (non-destructive testing) and that Dravo was to furnish the U. S. Coast Guard with an approved procedure for the non-destructive testing. All repaired areas were then to be retested to the satisfaction of the U. S. Coast Guard inspector. Commander Pitcock informed Inland that any defective welds detected by Inland and brought to the U. S. Coast Guard's attention would be corrected.

Neither Inland nor Dravo was satisfied with the actions taken by Commander Pitcock and both appealed to Captain J. W. Leadbetter, Chief, Marine Safety Division, Second Coast Guard District, St. Louis, Missouri. Dravo felt that Commander Pitcock's orders went too far; Inland did not think that they went far enough.

As has been seen, Commonder Pitcock directed Dravo to conduct non-destructive tests on "the identical areas to those rejected" originally. Inland contended that "all untested areas be adequately tested by non-destructive means to insure the workmanship on all parts of the vessel is satisfactory in all respects," which contention amounted to a claim that the barges be "100 percent non-destructive tested."[4] Captain Leadbetter affirmed the determination of Commander Pitcock, and the appeals were rejected.

Inland completed the administrative process by appealing from Captain Leadbetter's ruling to the Commandant of the Coast Guard, and he rendered his decision on appeal which has been mentioned. The Commandant's decision modified the original requirements by eliminating the requirement for non-destructive testing of specified areas and requiring in lieu thereof "reverse hydrostatic testing, another water test, as proposed by Dravo as a supplement to the usual visual examination and testing of all welds." The order recited among other things that the "application of a reverse hydrostatic test . . . remains as the final standard to be employed in this case."[5]

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[4] The last two quotations are from Captain Leadbetter's letter of June 3, 1976 to counsel for Inland rejecting Inland's appeal, Complaint, Exhibit "B".

[5] In his opinion the Commandant recognized that there were two main issues before him, the first relating to the standards to be applied in determining whether welding at the cargo space boundaries was acceptable, and the second relating to the acceptability of the

Plaintiff commenced this action on August 23, 1976. After stating the facts, plaintiff alleged that the final action of the Commandant was arbitrary, capricious, an abuse of discretion, not in accordance with law, without observance of required procedures, and unwarranted by the facts. The prayer of the complaint was as follows:

WHEREFORE, Inland prays that this Court:

(a) Reverse and set aside the August 13, 1976 final decision of the Commandant of the U. S. Coast Guard.

(b) Affirm the April 21, 1976 order of Commander Pitcock, as clarified by his May 28, 1976 order requiring NDT (non-destructive testing) of the barges which are the subject matter of this action;

(c) Grant Inland the relief sought in its appeal of May 19, 1976 with regard to broadening the scope of NDT to be required by the aforesaid orders of Commander Pitcock;

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welds upon application of the standards. Having so characterized the issues, the Commandant proceeded:

> . . . With respect to the former issue, it is a long standing practice that the Coast Guard relies upon visual inspection of hull welding supplemented by a hydrostatic or air test for barges certificated for inland service. This standard is understood and accepted by the inland barge industry and has resulted in the production of a large inland river barge fleet without a significant history of cargo tank boundary weld failure. This does not mean that the Coast Guard is not amenable to change. However consideration by the Coast Guard of a proposal to impose a higher standard of construction/inspection than that presently utilized/required can only be predicated on a complete review of casualty statistics or other data reflecting operating experience for the entire river barge industry indicating such a need. It is the intention of the Coast Guard to conduct such a review, which conceivably could result in some change to existing standards for uniform application to the industry. As the details of this review are formulated and data base requirements are identified, the inland barge industry will be called upon as a participant in the study. This aspect will be addressed by separate correspondence. With respect to the latter question and in order to further assess the situation, several Coast Guard inspectors have visited

(d) Stay any action by the U. S. Coast Guard with respect to the barges which are the subject matter of this action so as to preserve the status and rights of Inland pending conclusion of this review proceeding, pursuant to 5 U.S.C.A. § 705; and

(e) Enter such other and further orders as to this Court may seem just and proper in the premises.

The later procedural history of the case in the district court has been stated already. As has been seen, after Judge Regan dissolved his preliminary injunction or stay order the barges were certified, sold by Dravo to third parties after Inland refused to accept them, and presumably put into operation by the purchasers.

> the builder's yard and boarded the four vessels involved. The records of their visits contain no evidence of detection of inferior weldwents by visual identification. In addition, the examinations of the barges by Colex Corporation, an agent for I.O.T., as well as by an ABS surveyor, contain no evidence of inferior weldment determined by visual means. The application of a reverse hydrostatic test therefore remains as the final standard to be applied in this case.
>
> 5. It is the understanding of the Coast Guard that Dravo has agreed to repair welding defects brought to their attention as a result of either Coast Guard inspection or inspection by the prospective owners in those cases where agreement is reached that welding defects exist. It is also our understanding that I.O.T. has a contractual right to perform examinations and tests of the barge, and to require radiograph examination albeit chargeable to their own account and that I.O.T. has already exercised this right. Under these circumstances, I.O.T. is able to induce any level of quality control over and above that required by the Coast Guard. It is contrary to Coast Guard regulatory practice to impose varying standards of inspection upon different barges as an accomodation to the owners, especially in cases such as this where the owner is privileged to represent his own interests without intercession by the Federal Government. In this respect, the Coast Guard is aware that barge owners often exceed federal standards for their own special purposes such as to extend vessel sevice life, reduce maintenance and insure maximum vessel utility.

The purchasers are not identified nor is there any identification of the waters on which the barges are being operated or of the specific nature of the cargoes that are being transported in them. We will assume, however, that they are being used to transport flammable or explosive materials or chemicals that would be highly deleterious to the marine environment should they leak or spill from one or more of the barges.

In their motions the defendants alleged that the final action of the Coast Guard with respect to the barges was not subject to the judicial review, that plaintiff had no standing to maintain the action, and that, in any event, the happenings that had occurred since the suit was filed had rendered the controversy moot.

The final order of the district court recites that the court lacked jurisdiction of the case, and that plaintiff lacked standing to maintain the action. The district court did not touch upon the question of mootness.

For reversal, plaintiff contends that the administrative action in question is subject to judicial review, that plaintiff had standing to maintain the suit, and that notwithstanding the sale of the vessels, the controversy is not moot.

We agree with Inland that the district court had subject matter "jurisdiction" of the case since it arises under the laws of the United States, and as 28 U.S.C. § 1331(a) is now written, no jurisdictional amount is required in a case of this kind.

The holding of the district court that it lacked "jurisdiction" may mean no more than that the district court did not consider that the complaint stated a claim upon which relief could be granted and was subject to dismissal for that reason. The distinction between absence of subject matter jurisdiction of a case and a failure of a complaint to state a claim upon which relief can be granted is one that from a practical standpoint frequently

is unimportant. However, the distinction exists. *See Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 249 (1951); *see also Norton v. Blaylock*, 285 F.Supp. 659, 661-62 (W.D. Ark. 1968), *aff'd* 409 F.2d 772 (8th Cir. 1969), and cases cited.

In pertinent part the Administrative Procedure Act provides that agency action shall be subject to judicial review except to the extent that a statute precludes judicial review or to the extent that agency action is committed to agency discretion by law. 5 U.S.C. § 701(a)(1) and (2). The statutes with which we are concerned in this case do not prohibit judicial review of final decisions of the Commandant of the Coast Guard in connection with the certification of vessels designed for use on the inland waterways, and we are willing to assume, at least for the sake of argument, that the final decision of the Commandant in this case was subject to judicial review, and that Inland had standing initially to seek such review, at least to the extent that the decision of the Commandant was an ad hoc decision involving these four particular barges. *See Minnesota Public Interest Research Group v. Butz*, 541 F.2d 1292 (8th Cir.), *application to recall and stay mandate denied*, 429 U.S. 935, *cert. denied*, 430 U.S. 922 (1977); *Environmental Defense Fund, Inc. v. Corps of Engineers of the United States Army*, 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973).

Nevertheless, we are satisfied that the judgment of the district court should be affirmed. In our opinion the claim of the plaintiff became moot after the barges were finally certified and sold to third parties who were not before the district court. When that sale took place, plaintiff's controversy with the federal defendants ceased to exist from a practical standpoint, and plaintiff's controversy with Dravo is pending in the federal court in Pennsylvania.

Plaintiff concedes that it is no longer entitled to the specific relief that it sought originally. It claims, however, that it may be able to show that it is entitled to declaratory relief.[6]

Inland argues that it may be adversely affected by the fact that the allegedly unsafe vessels will operate on the same waters as those on which plaintiff's own vessels operate, and that the former vessels and their cargoes will constitute a source of danger to plaintiff's property and to the safety of its employees. One phase of this argument is that periodic reinspections of the vessels by the Coast Guard will or may be inadequate. We think the possibilities put forward by the plaintiff are too indirect, remote and conjectural to defeat the claim of mootness.

We are not impressed by Inland's contention that the agency action sought to be reviewed may purejudice plaintiff's position in the litigation now pending in Pennsylvania. Plaintiff has not challenged the statement of the Commandant, appearing in Exhibit "D" to the complaint, that Dravo had a right to insist on safety standards higher than those prescribed by the Coast Guard and to have the welds in the barges tested by X-rays to the extent desired by plaintiff so long as plaintiff was willing to pay for the testing. In other words, while plaintiff was not required to accept the barges unless they were approved by the Coast Guard, plaintiff was not required to accept unsafe barges simply because the agency had seen fit to issue the required certificates.

Finally, to the extent to which the plaintiff seeks to attack in this action the standards used by the Coast Guard in connection with these barges as opposed to the application of those standards to the particular vessels in question, we do not consider that the agency should be compelled to meet such an

[6] We note in passing that while the complaint contained the usual catch-all phrase to the effect that plaintiff should be awarded such other relief to which it might show itself entitled in lieu of the specific relief described in the prayer, nowhere is there any specific reference to any desire of the plaintiff to have any relief under the Declaratory Judgment Act, 28 U.S.C. § 2201 and 2202.

attack within the framework of this case as it now stands, assuming that in some other circumstances the standards might be subject to attack in the federal courts.

Accordingly, the order of the district court dismissing the complaint is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

Judgment

(Filed June 6, 1978)

United States Court of Appeals
For the Eighth Circuit

No. 77-1629 September Term, 1977

Inland Oil & Transport Co., Appellant,

v.

Cecil D. Andrus, Secretary of Interior, Admiral Owen W. Siler and Dravco Corp., Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

April 24, 1978

(See attached sheet for cost information.)

APPENDIX C

United States Court of Appeals
For the Eighth Circuit

77-1629 September Term, 1977

Inland Oil & Transport Co., Appellant,
v.
Cecil D. Andrus, etc., et al., Appellees.

Appeal from the United States District Court for the Eastern District of Missouri

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

May 24, 1978

APPENDIX D

EXHIBIT A

Department of Transportation
United States Coast Guard

Mailing Address
Commanding Officer
Marine Inspection
312 Stanwix Street
Pittsburgh, Pa. 15222
5050/5941

21 April 1976

Registered Mail
Return Receipt Requested
Inland Oil & Transport Co.
2510 S. Brentwood Blvd.
St. Louis, Mo. 63144

Attention: Mr. Herb Wolkowitz:

Gentlemen:

A meeting was called to take place at the MSO, Pittsburgh, Pa. between Inland Oil Transport, Dravo Corporation, the U. S. Coast Guard and any other interested parties. On 19 April 1976 at MSO, Pittsburgh, the following parties attended the meeting:

D. L. Courtsal, C. Van Mook, R. E. Wolf, Ray Koper, and Ed Bannon of Dravo Company. Mr. Jim Dowd of Inland Oil and Transport Company. Mr. W. A. Svekric of MJC Div. COL-X a welding consulting firm representing Inland

Oil & Transport Co. Mr. John S. Humble of ABSTECH, ABS Worldwide Representing Dravo. Commander, C. B. Pitcock, CO, MSO, Pittsburgh and CWO John Koehler, USCG Resident Inspector at Dravo Co.

This meeting was called to discuss construction standards and quality control on the following Dravo Hulls, 6617, 6618, 6619 and 6620 contracted for Inland Oil & Transport Company, 2510 S. Brentwood Blvd., St. Louis, Mo. 63144.

Discussion was held on different tests to determine tank boundary tightness with no firm results. Further information on the above test to be discussed in future correspondence.

COL-X Company of Columbus, Ohio representing I.O.T. presented radiographs taken at selected random locations on all four barges. The radiographs tended to show a definite pattern of defects at high stress areas. Those areas of three and four joints and upset or transition areas.

Dravo has been instructed that prior to certification all rejected areas determined by the radiographs are to be excavated to sound material and repaired using good marine practice in the presence of a Coast Guard Marine Inspector. Dravo has further been instructed that identical areas to those rejected are to be given a non-destructive test and all defective areas are to be repaired as above. Dravo is to furnish this office with an approved procedure for the non-destructive testing. All repaired areas are to be re-tested to the satisfaction of the cognizant Coast Guard Inspector.

I.O.T. was inferred that any defective welds detected by them and brought to our attention would be corrected.

Mr. Humble of ABSTECH made an inspection of hulls 6617 and 6619, and a cursory inspection was amde of the 6620 which is still under construction. Hull 6618 had water in the cargo tanks which hampered full inspection. At the meeting Mr.

Humble stated that he had been in contact with the principle A.B.S. Surveyor, he further stated that he did not detect any visual problems with workmanship on the inspected barges. All the above hulls are to be delivered with Load Lines.

If your company has any evidence that these vessels should not be certificated when the above repairs are made, it is requested that we be provided with the information prior to 23 April 1976.

Very truly yours,

/s/ C. B. Pitcock
Commander, U. S. Coast Guard
Commanding Officer

APPENDIX E

EXHIBIT B

Department of Transportation
United States Coast Guard

Mailing Address:
Commander (m)
Second Coast Guard District
Federal Bldg.
1520 Market St.
St. Louis, Mo. 63103
Tel. 314-425-4655
5941

3 June 1976

James W. Herron, Esq.
Lewis, Rice, Tucker, Allen and Chubb
Suite 1400 Railway Exchange Building
611 Olive Street
St. Louis, Missouri 63101

Dear Mr. Herron:

I have carefully considered the appeal on behalf of Inland Oil & Transport Company contained in your letter of 19 May 1976. That appeal is from the decision of the Officer-in-Charge, Marine Inspection, Pittsburgh, to require "identical areas to those rejected are to be given a non-destructive test." This appeal applies to Dravo hulls 6617 through 6620 under construction for Inland Oil & Transport Company.

As I understand your appeal you are of the opinion that the aforementioned requirement is not sufficiently broad to ade-

quately determine just how widespread and severe are the welding defects on the four barges in issue. Because of this you requested that all untested areas be adequately tested by non-destructive means to insure the workmanship on all parts of the vessel is satisfactory in all respects.

Your appeal in reality requests that the barges be 100 percent non-destructive tested. However, based on evidence now before me, I see no reason to require NDT testing in excess of that required of Dravo Corporation by the Officer-in-Charge, Marine Inspection, Pittsburgh, Pennsylvania. The Officer-in-Charge, Marine Inspection, Pittsburgh, on 28 May 1976 clarified the previous requirement as follows:

> "The following requirements are issued for Dravo hulls 6617, 6618, 6619, 6620, all areas with defects found by radiographs are to be excavated to sound material and repaired as per CO, MSO letter dated 21 April 1976.
>
> The following areas will require additional N.D.T.: butt joints with any of the following configurations:
> +
>
> random checks of longitudinal and transverse butt joints welded by semi-automatic submerged arc, and transition joints.
>
> You are further required to submit a proposed NDT for evaluation of fillet welds at cargo tanks bottom corners. At present the minimum number of N.D.T. examination areas are:
>
> 18 per cargo tank per barge;
>
> 48 on the outer hull of each vessel.
>
> After all examination and repairs are completed, hydro tests are required as outlined in OCMI Pittsburgh, Pennsylvania letter of 26 April 1976."

Therefore, your appeal is denied.

In keeping with your request, I am forwarding this matter to the Commandant of the Coast Guard for further appeal and final decision.

Sincerely,

/s/ J. W. Leadbetter
Captain, U. S. Coast Guard
Chief, Marine Safety Division
By direction of the District Commander

APPENDIX F

Department of Transportation
United States Coast Guard

Mailing Address
U.S. Coast Guard
(G-MVI-1/ 3)
Washington, D.C. 20590
16711
Phone: 202-426-1464

14 Aug. 1976

From: Commandant

To: Commander, 2nd Coast Guard District (m)

Subj: Dravo Corporation and I.O.T. Co., Appeal from decision of CCGD2(m) to require certain testing on Dravo Barge hulls 6617-6620

Ref: (a) CCGD2(m) ltr 5941 of 7 MAY 76 to COMDT (G-MVI)

(b) MSO, Pittsburgh ltr 5050/5941 of 21 APR 76 to Dravo Corp.

(c) Dravo ltr of 27 APR 76 to CCGD2(m)

(d) CCGD2(m) ltr 5941 of 7 MAY 76 to Dravo Corp.

1. Information provided in reference (a) and its enclosures indicates that the main thrust of the appeal by the Dravo Corporation is the requirement to conduct widespread non-destructive testing (NDT) of weldments on barge hulls (6617-6620). Subsequently, the Inland Oil and Transport Company (I.O.T.) was allowed by court order to intervene in the appeal proceedings. The thrust of the Inland Oil and Transport Com-

pany (I.O.T.) intervention in this matter is an attempt to require an increase in the scope of NDT so that subject barges would receieve nearly 100% radiography of all weldments.

2. Reference (b) sets forth the contested issue in the form of a requirement for NDT of all welding areas on the subject barges that are identical to those areas already repaired by Dravo on the first barge subsequent to NDT by I.O.T. Compliance with this NDT requirement would require that approximately 150 weldments in each barge be so tested. Reference (c), in addition to expressing objection to the NDT requirements, proposes "reverse hydrostatic testing" in lieu thereof.

3. Reference (d) reflects the CCGD2 point by point response to six issues raised by Dravo in their formal appeal of 27 April 1976 (Ref. c). This office concurs with their response on the first four issues which, in effect, merely restates the authority of the Coast Guard to require NDT of welding of barges. After careful consideration of the record in this appeal, including the material submitted by Dravo and I.O.T., the inspection procedure requirements set forth in reference (b) are modified herein. Specifically, the requirement for additional NDT on the remaining barges of areas identical to those indicated by NDT conducted by the prospective owner on the lead barge is set aside as being a matter within the purview of the owners. However, the reverse hydrostatic testing as proposed by Dravo shall be required as a supplement to the usual visual examination and testing of all welds. In this manner, the condition of the welded tank boundaries will have been subjected to a full and thorough test satisfactory to the Coast Guard in all respects for the intended cargo carriage and barge service.

4. In brief, this controversy centers on the acceptability of cargo tank boundary welds on "double skin" barges. The main

issues are: (a) the level of standards which must be applied to judge whether welding at the cargo space boundaries is acceptable, and (b) the acceptability of the welds upon application of the standards. With respect to the former issue, it is a long standing practice that the Coast Guard relies upon visual inspection of hull welding supplemented by a hydrostatic or air test for barges certificated for inland service. This standard is understood and accepted by the inland barge industry and has resulted in the production of a large inland river barge fleet without a significant history of cargo tank boundary weld failure. This does not mean that the Coast Guard is not amenable to change. However, consideration by the Coast Guard of a proposal to impose a higher standard of construction/inspection than that presently utilized/required can only be predicated on a complete review of casualty statistics or other data reflecting operating experience for the entire river barge industry indicating such a need. It is the intention of the Coast Guard to conduct such a review, which conceivably could result in some change to existing standards for uniform application to the industry. As the details of this review are formulated and data base requirements are identified, the inland barge industry will be called upon as a participant in the study. This aspect will be addressed by separate correspondence. With respect to the latter question and in order to further assess the situation, several Coast Guard inspectors have visited the builder's yard and boarded the four vessels involved. The records of their visits contain no evidence of detection of inferior weldments by visual identification. In addition, the examinations of the barges by Colex Corporation, an agent for I.O.T., as well as by an ABS surveyor, contain no evidence of inferior weldment determined by visual means. The application of a reverse hydrostatic test therefore remains as the final standard to be applied in this case.

5. It is the understanding of the Coast Guard that Dravo has agreed to repair welding defects brought to their attention as

a result of either Coast Guard inspection or inspection by the prospective owners in those cases where agreement is reached that welding defects exist. It is also our understanding that I.O.T. has a contractual right to perform examinations and tests of the barge, and to require radiograph examination albeit chargeable to their own account and that I.O.T. has already exercised that right. Under these circumstances, I.O.T. is able to induce any level of quality control over and above that required by the Coast Guard. It is contrary to Coast Guard regulatory practice to impose varying standards of inspection upon different barges as an accommodation to the owners, especially in cases such as this where the owner is privileged to represent his own interests without intercession by the Federal Government. In this respect, the Coast Guard is aware that barge owners often exceed federal standards for their own special purposes such as to extend vessel service life, reduce maintenance and insure maximum vessel utility.

6. A copy of this letter may be sent directly to appellants as an enclosure to your response in this matter.

/s/ W. M. BANDERT
(Illegible)

APPENDIX G

[From Title 46, U.S.C.]

§ 391. Hulls and Equipment—Steam Vessels Carrying Passengers; annual inspection

(a) The head of the department in which the Coast Guard is operating shall require the Coast Guard to inspect before the same shall be put into service, and at least once in every year thereafter, the hull of every steam vessel carrying passengers; to determine to its satisfaction that every such vessel so submitted to inspection is of a structure suitable for the service in which she is to be employed, has suitable accommodations for passengers and the crew, and is in a condition to warrant the belief that she may be used in navigation, with safety to life, and that the vessel is in full compliance with the applicable requirements of this title or Acts amendatory or supplementary thereto and regulations thereunder; and if deemed expedient, to direct the vessel to be put in motion or to adopt any other suitable means to test her sufficiency and that of her equipment.

Steam vessels not carrying passengers; biennial inspection

(b) The head of the department in which the Coast Guard is operating shall require the Coast Guard to inspect before the same shall be put into service, and at least once in every two years thereafter, the hull of each steam vessel, not carrying passengers; to determine to its satisfaction that every such vessel so submitted to inspection is of a structure suitable for the service in which she is to be employed, has suitable accommodations for the crew, and is in a condition to warrant the belief that she may be used in navigation, with safety to life, and that the vessel is in full compliance with the applicable require-

ments of this title or Acts amendatory or supplementary thereto and regulations thereunder; and if deemed expedient, to direct the vessel to be put in motion or to adopt any other suitable means to test her sufficiency and that of her equipment.

Sail vessels over 700 tons or other vessels and barges over 100 tons carrying passengers; annual inspection

(c) The head of the department in which the Coast Guard is operating shall require the Coast Guard to inspect before the same shall be put into service, and at least once in every year thereafter, the hull of each sail vessel of over seven hundred gross tons carrying passengers for hire and all other vessels and barges of over one hundred gross tons carrying passengers for hire; and to determine to its satisfaction that every such vessel so submitted to inspection is of a structure suitable for the service in which she is to be employed, has suitable accommodations for the passengers and crew, and is in condition to warrant the belief that she may be used in navigation with safety to life.

Requirements and enforcement; appeals

(d) Whenever it is found on board any vessel subject to the provisions of this title, or any Acts amendatory or supplementary thereto, that any equipment, machinery, apparatus, or appliances do not conform to the requirements of law or regulations promulgated thereunder, the owner or master of said vessel shall be required to place the same in proper condition; and if there shall be found on board any such vessel any life preserver or fire hose so defective as to be incapable of repair, the owner or master shall be required to destroy the same in the presence of an official designated by the head of the department in which the Coast Guard is operating. In any of the foregoing cases the requirements may be enforced by revoking the certificate of said vessel, and by refusing to issue a

new certificate until the requirements have been fully complied with. In any case where the head of the department in which the Coast Guard is operating has delegated to a Coast Guard official the authority to enforce the said requirements by revocation of certificates of inspection, the action of said Coast Guard official may be reversed, modified, or set aside by the head of the department in which the Coast Guard is operating on proper appeal by the owner or master of said vessel. Appeals shall be made to the head of the department in which the Coast Guard is operating within thirty days after the final action of the aforesaid Coast Guard official.

Exemptions

(e) Vessels subject to inspection under this title or Acts amendatory or supplementary thereto while laid up and dismantled and out of commission may, by regulations established by the head of the department in which the Coast Guard is operating, be exempted from any or all inspection under this section and sections 392, 404, and 405 of this title.

§ 391a. Vessels Having on Board Inflammable or Combustible Liquid Cargo in Bulk

(1) Vessels included

All vessels, regardless of tonnage, size, or manner of propulsion, and whether self-propelled or not, and whether carrying freight or passengers for hire or not, that shall have on board any inflammable or combustible liquid cargo in bulk, except public vessels owned by the United States, other than those engaged in commercial service, shall be considered steam vessels for the purposes of title 52 of the Revised Statutes and shall be subject to the provisions thereof: *Provided*, That this section

shall not apply to vessels having on board only inflammable or combustible liquid for use as fuel or stores or to vessels carrying liquid cargo only in drums, barrels, or other packages.

(2) Rules and regulations for handling liquid cargo

In order to secure effective provision against the hazards of life and property created by the vessels to which this section applies, the Commandant of the Coast Guard shall establish such additional rules and regulations as may be necessary with respect to the design and construction, alteration, or repair of such vessels, including the superstructures, hulls, places for stowing and carrying such liquid cargo, fittings, equipment, appliances, propulsive machinery, auxiliary machinery, and boilers thereof; and with respect to all materials used in such construction, alteration, or repair; and with respect to the handling and stowage of such liquid cargo; the manner of such handling or stowage, and the machinery and appliances used in such handling and stowage; and with respect to equipment and appliances for life-saving and fire protection; and with respect to the operation of such vessels; and with respect to the requirements of the manning of such vessels and the duties and qualifications of the officers and crews thereof; and with respect to the inspection of all the foregoing. In establishing such rules and regulations the Commandant of the Coast Guard may adopt rules of the American Bureau of Shipping or similar American classifications society for classed vessels insofar as such rules pertain to the efficiency of hulls and the reliability of machinery of vessels to which this section applies. In establishing such rules and regulations, the Commandant of the Coast Guard shall give due consideration to the kinds and grades of such liquid cargo permitted to be on board such vessel.

(3) Hearing before approval of rules

Before any rules and regulations, or any alteration, amendment, or repeal thereof, are approved by the Commandant of

the Coast Guard under the provisions of this section, except in an emergency, the said Commandant shall publish such rules and regulations and hold hearings with respect thereto on such notice as he deems advisable under the circumstances.

(4) Certificate of inspection and permit required; time of indorsing permit; inspection; duration of permit; vessels of foreign nations; permit for prohibited materials

No vessel subject to the provisions of this section shall, after the effective date of the rules and regulations established hereunder, have on board such liquid cargo, until a certificate of inspection has been issued to such vessel in accordance with the provisions of title 52 of the Revised Statutes and until a permit has been endorsed on such certificate of inspection by the Coard Guard, indicating that such vessel is in compliance with the provisions of this section and the rules and regulations established hereunder, and showing the kinds and grades of such liquid cargo that such vessel may have on board or transport. Such permit shall not be endorsed by the Coast Guard on such certificate of inspection until such vessel has been inspected by the Coast Guard and found to be in compliance with the provisions of this section and the rules and regulations established hereunder. For the purpose of any such inspection approved plans and certificates of class of the American Bureau of Shipping or other recognized classification society for classed vessels may be accepted as evidence of the structural efficiency of the hull and the reliability of the machinery of such classed vessels except as far as existing law places definite responsibility on the Coast Guard. A permit issued under the provisions of this section shall be valid for a period of time not to exceed the duration of the certificate of inspection on which such permit is endorsed, and shall be subject to revocation by the Coast Guard whenever it shall find that the vessel concerned does not comply with the conditions upon which such permit was issued: *Pro-*

vided, That the provisions of this subsection shall not apply to vessels of a foreign nation having on board a valid certificate of inspection recognized under law or treaty by the United States; *And provided further*, That no permit shall be issued under the provisions of this section authorizing the presence on board any vessel of any of the materials expressly prohibited from being thereon by subsection (3) of section 170 of this title.

(5) Shipping documents required on board; contents

Vessels subject to the provisions of this section shall have on board such shipping documents as may be prescribed by the Commandant of the Coast Guard indicating the kinds, grades, and approximate quantities of such liquid cargo, on board such vessel, the shippers and consignees thereof, and the location of the shipping and destination points.

(6) Number of officers and tankermen; certificate as tankermen; suspension or revocation of certificate

(a) In all cases where the certificate of inspection does not require at least two licensed officers, the Coast Guard shall enter in the permit issued to any vessel under the provisions of this section the number of the crew required to be certificated as tankermen.

(b) The Coast Guard shall issue to applicants certificates as tankerman, stating the kinds of liquid cargo the holder of such certificate is, in the judgment of the Coast Guard, qualified to handle aboard vessels with safety, upon satisfactory proof and examination, in form and manner prescribed by the Commandant of the Coast Guard, that the applicant is in good physical condition, that such applicant is trained in and capable efficiently to perform the necessary operations aboard vessels having such liquid cargo on board, and that the applicant fulfills the qualifications of tankerman as prescribed by the Commandant of the Coast Guard under the provisions of this section. Such certificates shall be subject to suspension or revocation on the same grounds and in the same manner and with like procedure as is provided in the case of suspension or revocation of licenses of officers under the provisions of section 239 of this title.

(7) Penalties

The owner, master, or person in charge of any vessel subject to the provisions of this section, or any or all of them, who shall violate the provisions of this section, or of the rules and regulations established hereunder, shall be subject to a fine of not more than $1,000 or imprisonment for not more than one year, or both such fine and imprisonment.

(8) Effective date of rules and regulations

The rules and regulations to be established pursuant to this section shall become effective ninety days after their promulgation unless the Commandant of the Coast Guard shall for good cause fix a different time.

Supreme Court, U. S.
FILED
AUG 18 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 78-115

INLAND OIL & TRANSPORT CO.,
Petitioner,

v.

BROCK ADAMS,
(previously William T. Coleman, Jr.),
Secretary of Transportation,

ADMIRAL OWEN W. SILER,
Commandant, United States Coast Guard,

and

DRAVO CORPORATION,
Respondents.

BRIEF

Of Dravo Corporation in Opposition to Petition for Writ of Certiorari

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IN THE

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No. .....

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BRIEF

Of Dravo Corporation in Opposition to Petition for Writ of Certiorari

STATUTES

Inland, in its Petition for Writ of Certiorari, has correctly cited all current revisions to 46 U.S.C. § 391a [Pet. for Writ., p. 2] but has inadvertently printed the pre-amended 1946 version of § 391a, (1)-(8) in the Appendix to its Petition [A, A-27-31]. Included in the Appendix hereto is the full current text of 46 U.S.C. § 391a, (1)-(13).

STATEMENT OF THE CASE

Dravo Corporation [hereafter "Dravo"] concurs with the Statement of the Case by Petitioner, Inland Oil and Transport Company [hereafter "Inland"] except to the extent hereinafter indicated.

Inland's Petition for Writ of Certiorari [hereafter cited as "Pet. for Writ"] states that "Inland alleged that the refusal (of the Coast Guard) to conduct X-ray testing was a violation of the Commandant's statutory duty to inspect barges and to establish rules and regulations for the protection of the marine environment . . ." [Pet. for Writ, p. 3] However, paragraph 13 of Inland's Complaint states that "(p)ursuant to the foregoing statutes (referring to 46 U.S.C. § 391(b) and certain cited sections of 46 U.S.C. § 391a) and the rules and regulations issued thereunder, the U.S. Coast Guard undertook to inspect the aforementioned four barges." [A, 4a] Inland also acknowledged the U.S. Coast Guard's use of "visual, air and water tests" on these barges in paragraph 28 of its Complaint. [A, 8a] It is clear that Inland's allegations were not that the Commandant violated his duty to inspect and to establish rules and regulations pursuant to the statute, but rather that such inspection and rules and regulations were inadequate in Inland's opinion.

It should be noted that Inland conceded in its appeal to the Eighth Circuit Court of Appeals that it was no longer entitled to the specific relief which it originally sought before the barges were certificated and sold to third parties [A, A-12], namely a stay of any action by the U.S. Coast Guard with respect to testing and certifying of these barges, and an order of the Court requiring the Coast Guard not to issue Certificates of Inspection to these barges until requiring or conducting extensive X-ray testing. [A, 9a] Inland then however, for the first time in this

suit suggested to the Court of Appeals in its Brief that the Court might consider declaratory relief. [A, A-12, f.n. 6]

Finally, it is also to be pointed out that assertions of Inland in its Statement of the Case contained in its Petition for Writ of Certiorari as to the possibility of harm to itself resulting from allegedly improperly certificated barges used by others [Pet. for Writ, p. 4] are not contained in its pleadings but only in legal briefs or memorandums filed with the Court. The Inland citation to "[Court of Appeals Appendix at 63a-64a]" [Pet. for Writ, p. 4] is likewise to a legal brief and not to its pleadings.

NOTE: All references to Petitioner's Appendix included with the Petition for Writ of Certiorari are designated herein as "[A, A-(Page No.)]". All references to the Appendix included with this Brief in Opposition to Petition for Writ of Certiorari are designated herein as "[A, (Page No.)a]".

ARGUMENT

The only apparent assertion by Inland, among the considerations enumerated in Supreme Court Rule 19, as to why certiorari should be granted in this case is that the Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court. [Pet. for Writ, p.5] However, such is not the case.

After a lengthy administrative appeal process and the completion of certain additional testing ordered by the Commandant, the four barges in question were certified by the Coast Guard, rejected by Inland, and subsequently sold to third parties. At that point, Inland's interest and position in this suit significantly and substantially changed. Petitioner has shifted from the position of a potentially directly concerned owner-user of these barges to a company claiming, in briefs but not in pleadings, possible indirect consequences to its property and the marine environment which might result if allegedly improperly certificated barges are continued to be used by others.

The parties all agree that in order for there to be an actual Article III "case or controversy", such as is necessary to empower federal courts to act, there must be demonstrated the existence of a "definite and concrete" controversy which "touch(es) the legal relations of parties having adverse legal interests." *De Funis v. Odegaard*, 416 U.S. 312, 317, 40 L. Ed.2d 164, 169, 94 S.Ct. 1704 (1974). However, this very case as cited by Petitioner in support of its Petition for Writ of Certiorari clearly is not in conflict with the decision of the Eighth Circuit Court of Appeals in finding the issue moot.

In *De Funis*, this Court found that the controversy between the law student and the law school, as to the school's initial refusal to admit him, was mooted when *De Funis* was admitted to, but had not completed, his final term of law school. This

Court noted that "De Funis did not cast his suit as a class action, and the only remedy he requested was an injunction commanding his admission to the Law School." *Id.* 416 U.S. at 317, 40 L.Ed.2d at 169.

Likewise, Inland did not cast its suit in terms of a class action and the certification of the barges which it sought to prevent has been completed and the barges are in use.

Further, the *De Funis* case supports the Eighth Circuit's conclusion that ". . . the possibilities (of adverse effects) put forward by the plaintiff are too indirect, remote and conjectural to defeat the claim of mootness." [A, A-12] In *De Funis* it was argued that the case was not moot since plaintiff had not completed school and might not do so due to possible academic failure, economic circumstances or illness. This Court held that those possibilities were ". . . speculative contingencies (which) afford no basis for our passing on the substantive issues . . ." *De Funis v. Odegaard, supra*, 416 U.S. at 320, f.n. 5, 40 L.Ed. 2d at 171, citing *Hall v. Beals*, 396 U.S. 45, 49, 24 L.Ed. 2d 214, 90 S.Ct. 200 (1969).

The harm alleged by Inland in its pleadings in the District Court is illustrated by the following quotations from its Complaint below:

> "8. Inland intends to use the aforesaid barges to transport methyl alcohol, a cargo which is included in the classification set forth in paragraph 7 above.
>
> "9. Methyl alcohol is a liquid of extremely low viscosity and will leak through extremely small *holes or cracks* in barges.
>
> "15. An agent of Inland . . . selected certain areas of said barges and subjected said areas to radiographic tests (X-rays), which revealed a number of *defects* in welds in the sample area of the barges.

"29. *If* the methyl alcohol intended to be transported in the aforesaid barges *should leak* out of the barges there would be an extreme hazard to life and property due to the extreme flammability of the methyl alcohol and the likelihood of an explosion. Similarly, *if* methyl alcohol *should leak* out of the barges and into the water, its poisonous nature would create a hazard to the marine environment." [emphasis supplied] [A, 3a-9a]

Inland has not amended or supplemented its Complaint which is reprinted in full in the Appendix hereto [A, 1a-10a]. There are and have been no allegations in the pleadings or otherwise that methyl alcohol will or may be transported by the current barge owners, as to where those current owners will operate the barges, what would be the effect on Inland, or that the alleged welding "defects", which have passed Coast Guard leak testing with pressurized air and water tests, are "holes or cracks" through which *any* kind of cargo would leak. There must be a prospect of "immediacy and reality" to such allegations in order to constitute such an actual controversy. *Golden v. Zwickler*, 394 U.S. 103, 109, 22 L.Ed. 2d 113, 118, 89 S.Ct. 956 (1969); *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 85 L.Ed. 826, 829, 61 S.Ct. 510 (1941).

The substantially broadened concern of ". . . wide ranging economic liability in the event of spillage of hazardous cargo or an explosion . . ." [Pet. for Writ, p. 4] of allegedly improperly certificated barges used by others which Inland asserts in legal briefs, but not in its pleadings, is still too remote and speculative to have the required prospect of "immediacy and reality". Further, however, such assertions should be disregarded since factual statements and assertions contained in briefs are not a part of the record and should not be considered on appeal. *In re Frank Fehr Brewing Co.*, 268 F.2d 170, 183 (6th Cir. 1969), cert. den. *Kremer v. Clark*, 362 U.S. 963, 4 L.Ed.2d 878, 80 S.Ct. 880 (1960); *Nelson v. Swing-A-Way Mfg. Co.*,

266 F.2d 184, 190 (8th Cir. 1959); *Starke v. New York, Chicago & St. Louis Rwy. Co.*, 180 F.2d 569, 570 (7th Cir. 1950).

Inland then moves from "mootness" considerations to assertions regarding its "standing" by citing *United States v. SCRAP*, 412 U.S. 669, 37 L.Ed. 254, 93 S.Ct. 2405 (1973). Petitioner asserts that if the attenuated relationship between the agency action and the private harm alleged by plaintiffs in *United States v. SCRAP*, (that is, the effect of the 2½% rail freight surcharge on the discouragement of the use of recyclable materials and the resulting adverse effect on natural areas used by them) was sufficient to confer standing, then certainly Inland's position here is less tenuous. The defect in this argument is that we are not analyzing difficulties of proof but rather sufficiency of pleading.

". . . we deal here simply with the pleadings in which the appellees (SCRAP) alleged a specific and perceptible harm that distinguished them from other citizens who had not used the natural resources that were claimed to be affected." *United States v. SCRAP*, 412 U.S. 669, 689, 37 L.Ed.2d 254, 270.

The *SCRAP* plaintiffs did not allege mere possibility of harm. Although the line of causation was attenuated, they alleged that the harm would result. *Id.* at 688, 37 L.Ed.2d at 270. The *SCRAP* case went on to point out that ". . . pleadings must be something more than an ingenious exercise in the conceivable . . . not that he (plaintiff) can imagine circumstances in which he could be affected by the agency's action." *U.S. v. SCRAP*, 412 U.S. 669, 688-689, 37 L.Ed.2d 254, 270. Inland's pleadings assert no more than remote possibilities.

Petitioner cites *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 40 L.Ed.2d 1, 94 S.Ct. 1694 (1974) for the proposition that: "(i)f there is a continuing Article III case or controversy as to which the court can give effective relief, the action is

not moot." In this split court decision it was held that the termination of a specific strike had not mooted the issue of New Jersey's continuing practice and policy of granting state public welfare assistance to economic strikers. While the instant case neither presents the same broad reoccurring issues which are "incapable of review" nor represents a policy or procedure of a government agency which is not likely to change (see Commandant's final decision[1] [A, A-23]) there is another significant difference in the cases. In *Super Tire Engineering Co.* "(t)he petitioners (have) sought, from the very beginning, *declaratory* relief as well as an injunction." *Super Tire Engineering Co.*, 416 U.S. at 121, 40 L.Ed.2d at 7. In the instant case the only issue before the court was the requested judicial review of the Coast Guard's decision to issue Certificates of Inspection for these barges without additional X-ray inspection. The Certificates were issued in November 1976 and the barges sold and delivered to third parties in April 1977 [A, 12a]

The *Super Tire Engineering Co.* proposition above cited also raises the issue of whether the asserted case or controversy is one as to which the court is able to give "effective relief." See also *Mills v. Green*, 159 U.S. 651, 653, 40 L.Ed. 293, 294, 16 S.Ct. 132 (1895). The declaratory relief which was first suggested by Inland in its Brief before the Court of Appeals, presumably a declaration to the effect that the Secretary of Transportation and the Coast Guard Commandant acted improperly in certifying the barges, would not have the effect of revoking or cancelling the Certificates of Inspection already issued. Such relief

[1] "This does not mean the Coast Guard is not amenable to change. However, consideration by the Coast Guard of a proposal to impose a higher standard of construction/inspection than that presently utilized/required can only be predicated upon a complete review of casualty statistics or other data reflecting operating experience for the entire river barge industry indicating such a need. It is the intention of the Coast Guard to conduct such a review . . . This aspect will be addressed by separate correspondence . . ." [A, A-23].

would not resolve Inland's alleged concern for possible harm to the marine environment or to its property and employees.

Inland asserts in its Petition for Writ of Certiorari that since the Coast Guard has a responsibility to reinspect these barges every two years such a declaration could effect the reinspection procedures. Inland's Complaint related only to the initial certification rules, regulations and inspection procedures. There was never previously raised the issue of such reinspection rules, regulations and procedures and no reason to believe that such procedures are or ought to be the same as those for initial certification.

Further, if *any* relief sought by Inland or rendered by the court would involve a revocation or suspension of the Certificates, there would certainly be an adverse effect on the current barge owners who are not parties to this action. Thus, such relief should not be granted as it involves statutory rights of parties not before the court. *International Brotherhood of Teamsters v. Zantop Air Transport Corp.*, 394 F.2d 36, 41 (6th Cir. 1968).

To the extent that Inland is seeking a review of the application of the Coast Guard rules and regulations regarding issuing Certificates of Inspection for these four barges, this has been completed, the barges are in use by others and the issue is moot. To the extent this challenge is directed at changing allegedly inadequate Coast Guard rules and regulations regarding such inspections, 46 U.S.C. §391a(4) [A, 15a-16a] provides the precise procedural requirements for so doing and there has been no allegation that such procedures have not been followed or that rules and regulations do not exist. To the extent that Inland asserts that Dravo did not build or weld barges to proper contract requirements, that issue is still pending in the Federal District Court in the Western District of Pennsylvania in a breach of contract action between Inland and Dravo. [A, A-12]

CONCLUSION

For the reasons stated, there appears no reason to grant certiorari to review the judgment of the Eighth Circuit Court of Appeals in this case.

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APPENDIX

APPENDIX A

United States District Court
Eastern District of Missouri
Eastern Division

Inland Oil & Transport Co.
2510 South Brentwood Boulevard
St. Louis, Missouri 63144,
Plaintiff,

vs.

William T. Coleman, Jr.
Secretary of Transportation
400 Seventh Street, S.W.
Washington, D.C. 20590
Serve:
U. S. Department of Transportation
1114 Market Street
St. Louis, Missouri 63101
and
Admiral Owen W. Siler
Commandant
U. S. Coast Guard
400 Seventh Street, S.W.
Washington, D.C. 20590
Serve:
2nd District Headquarters
U. S. Coast Guard
1520 Market Street
St. Louis, Missouri 63103,
Defendants.

Civil Action No.
76-761C(2).

COMPLAINT FOR JUDICIAL REVIEW AND STAY OF PROCEEDINGS
(Appeal From Final Agency Action)

(Filed August 23, 1976)

Comes now the plaintiff, Inland Oil & Transport Co. (hereinafter "Inland") and, for its cause of action against the defendants, states that:

1. Inland is a corporation incorporated and existing under the laws of the State of Missouri. Inland's principal place of business is located at 2510 South Brentwood Boulevard, St. Louis, Missouri 63144.

2. Defendant William T. Coleman, Jr. (hereinafter "the Secretary") is the Secretary of Transportation, Department of Transportation, Washington, D.C. 20590. The Department of Transportation is an agency of the United States Government.

3. Defendant Adm. Owen W. Siler (hereinafter "the Commandant") is the chief executive of the United States Coast Guard, 400 Seventh Street, S.W., Washington, D.C. 20590. The United States Coast Guard is an agency of the United States Government.

4. Jurisdiction in this Court is predicated on 28 U.S.C.A. § 1331 (Federal Question); 5 U.S.C.A. §§ 702 through 706 (Review of Agency Action—Administrative Procedure Act); and 46 U.S.C.A. § 391a. The amount in controversy exceeds the sum of Ten Thousand Dollars ($10,000), exclusive of interest and costs.

5. Inasmuch as Inland resides within the Eastern Judicial District of Missouri, pursuant to 28 U.S.C.A. § 1391(e), venue properly lies in this District.

6. On or about December 5, 1973, Inland entered into a written agreement with the Dravo Corporation (hereinafter "Dravo"), Pittsburgh, Pennsylvania, under the terms of which Dravo agreed to build and sell to Inland, and Inland agreed to

buy, one double skin, integrated tank barge fleet consisting of four barges.

7. The barges to be sold to Inland by Dravo are to be furnished with a U. S. Coast Guard Certificate of Inspection for the carriage of Grade A or lower cargoes of flammable or combustible liquids.

8. Inland intends to use the aforesaid barges to transport methyl alcohol, a cargo which is included in the classification set forth in paragraph 7 above.

9. Methyl alcohol, also known as wood alcohol, is a highly flammable, poisonous, liquid alcohol, formed in the destructive distillation of wood or made synthetically and is used as a solvent, anti-freeze, or denaturant for ethyl alcohol and in the synthesis of other chemicals. Methyl alcohol is a liquid of extremely low viscosity and will leak through extremely small holes or cracks in barges.

10. Pursuant to the provisions of Title 52 of the Revised Statutes of the United States:

> "The head of the department in which the Coast Guard is operating shall require the Coast Guard to inspect before the same shall be put into service . . . the hull of each steam vessel, not carrying passengers; to determine to its satisfaction that every such vessel so submitted to inspection is of a structure suitable for the service in which she is to be employed . . . and is in a condition to warrant the belief that she may be used in navigation with safety to life, and that the vessel is in full compliance with the applicable requirements of this title or Acts amendatory or supplementary thereto and regulations thereunder; . . .". (46 U.S.C.A. 391(b))

11. Section 391a.(2), 46 U.S.C.A., provides:

"All vessels, regardless of tonnage size, or manner of propulsion, and whether self-propelled or not, and whether carrying freight or passengers for hire or not, which are documented under the laws of the United States or enter the navigable waters of the United States, except public vessels other than those engaged in commercial service, that shall have on board liquid cargo in bulk which is—(A) inflammable or combustible . . . shall be considered steam vessels for the purposes of title 52 of the Revised Statutes of the United States, and shall be subject to the provisions thereof."

12. Section 391a.(5), 46 U.S.C.A., provides:

"No vessel subject to the provisions of this section shall, after the effective date of the rules and regulations for vessel safety established hereunder, have on board such cargo, until a certificate of inspection has been issued to such vessel in accordance with the provisions of title 52 of the Revised Statutes of the United States and until a permit has been endorsed on such certificate of inspection by the Secretary, indicating that such vessel is in compliance with the provisions of this section and the rules and regulations for vessel safety established hereunder, and showing the kinds and grades of such cargo that such vessel may have on board or transport. Such permit shall not be endorsed by the Secretary on such certificate of inspection until such vessel has been inspected by the Secretary and found to be in compliance with the provisions of this section and the rules and regulations for vessel safety established hereunder."

13. Pursuant to the foregoing statutes and rules and regulations issued thereunder, the U. S. Coast Guard undertook to inspect the aforementioned four barges.

14. The inspection of the barges made by the U. S. Coast Guard agent consisted of a visual inspection for faulty welds,

an air test whereby the barges are filled with air and inspected for leaks, and a water test whereby the barges are filled with water and inspected for leaks. Based upon said inspection, the U. S. Coast Guard intended to issue Certificates of Inspection and permits for said barges.

15. An agent of Inland, Mr. William A. Svekric, of the Col-X Corporation, selected certain areas of said barges and subjected said areas to radiographic tests (X-rays), which revealed a number of defects in welds in the sample areas of the barges, and he advised the Coast Guard of his findings.

16. The U. S. Coast Guard examined the results of Mr. Svekric's tests and concluded that the sum tended to show a definite pattern of defects at high stress areas of the barges in question, thus demonstrating the inadequacy of the air, water and visual tests employed by the U. S. Coast Guard. Commander C. E. Pitcock, Commanding Officer, U. S. Coast Guard, Marine Safety Office, Pittsburgh, Pennsylvania, by orders dated April 21, 1976 and May 28, 1976 (Exhibits A and B attached hereto and made a part hereof), instructed Dravo that prior to certification all rejected areas determined by the radiographs were to be excavated to sound material and repaired using good marine practice. He further instructed Dravo that certain areas of the said barges were to be given additional NDT (non-destructive testing) and that Dravo was to furnish the U. S. Coast Guard with an approved procedure for the non-destructive testing. All repaired areas were then to be retested to the satisfaction of the U. S. Coast Guard inspector. Commander Pitcock informed Inland that any defective welds detected by Inland and brought to the U. S. Coast Guard's attention would be corrected.

17. Subsequent to Commander Pitcock's order of April 21, 1976, Dravo filed an administrative Appeal from Commander Pitcock's order to the Second Coast Guard District.

18. On May 19, 1976, Inland filed its administrative appeal relating only to the second instruction to Dravo that "identical areas to those rejected are to be given a non-destructive test . . ." (see Exhibit C attached hereto and made a part hereof).

19. On June 3, 1976, the Commander, Second Coast Guard District, by Captain J. W. Leadbetter, Chief, Marine Safety Division, denied Inland's appeal. In said denial Captain Leadbetter affirmed the order of Commander Pitcock and noted that Commander Pitcock's order had been clarified May 28, 1976, with certain specific requirements (see Exhibit B attached hereto).

20. On June 4, 1976, Inland submitted to Captain Leadbetter certain documents in connection with its appeal and asked that Captain Leadbetter's decision of June 3, 1976, denying Inland's appeal, be set aside.

21. On June 7, 1976, Captain Leadbetter advised Inland that, after having considered the additional material submitted to him on June 4, he saw no reason to change his June 3, 1976 decision. Captain Leadbetter further advised that Inland's June 4 letter, together with enclosures, was being forwarded to the Commandant of the U. S. Coast Guard as part of Inland's appeal.

22. On June 9, 1976, Inland appealed to the Commandant of the U. S. Coast Guard the decision of Captain J. W. Leadbetter as noted in his letters of June 3 and June 7 aforesaid.

23. On August 13, 1976, the Commandant of the U. S. Coast Guard issued his final decision on Inland's administrative appeal, a copy of which is attached hereto as Exhibit D and made a part hereof. Said decision modified the order issued by Commander Pitcock and affirmed by Captain Leadbetter by setting aside the requirement for additional NDT (non-destructive testing) and requiring reverse hydrostatic testing, another water test, as proposed by Dravo as a supplement to the usual visual examination and testing of all welds.

24. Said final decision of the Commandant further stated:

> "The application of a reverse hydrostatic test therefore remains as the final standard to be applied in this case."

Inland has been advised that such hydrostatic tests will commence on Monday, August 23, 1976, at 8:00 a.m. in Pittsburgh, Pennsylvania. Inland has reason to believe that if the results of the tests are satisfactory to the U. S. Coast Guard, Certificates of Inspection and permits will be issued forthwith.

25. Inland, having exhausted its administrative remedies, herewith petitions this Court for a review of the aforesaid final decision of the Commandant of the U. S. Coast Guard pursuant to 5 U.S.C.A. §702 and for a stay of any action by the U. S. Coast Guard with respect to the barges which are the subject matter of this action pursuant to 5 U.S.C.A. §705.

26. Inland alleges that the air, water and visual inspections which have already been conducted by the U. S. Coast Guard and proved to have been inadequate, and the further similar tests ordered to be performed by Dravo pursuant to the Commandant's final decision as stated above, are wholly inadequate and insufficient to determine whether the barges are in compliance with the statutes quoted above, and that any Certificates of Inspection and any permits issued by the U. S. Coast Guard pursuant to said inspections would violate the statutory mandate of the Congress and violate the statutory duties imposed upon the U. S. Coast Guard.

27. The Congressional mandate and the obligation of the U. S. Coast Guard pursuant thereto are clearly delineated in 46 U.S.C.A. § 391a.(1), which provides:

> "The Congress hereby finds and declares—that the carriage by vessels of certain cargoes in bulk creates substantial hazards to life, property, the navigable waters of the United States (including the quality thereof) and the resources contained therein and of the adjoining land, including but

not limited to fish, shellfish, and wildlife, marine and coastal ecosystems and recreational and scenic values, which waters and resources are hereafter in this section referred to as the 'marine environment'.

That existing standards for the design, construction, alteration, repair, maintenance and operation of such vessels must be improved for the adequate protection of the marine environment. (emphasis added)

That it is necessary that there be established for all such vessels documented under the laws of the United States or entering the navigable waters of the United States comprehensive minimum standards of design, construction, alteration, repair, maintenance, and operation to prevent or mitigate the hazards to life, property and the marine environment."

27. (sic) 46 U.S.C.A. § 391a.(3) requires the Secretary to:

"[E]stablish for the vessels to which this section applies such additional rules and regulations as may be necessary with respect to the design and construction, alteration, repair, and maintenance of such vessels, including, but not limited to, the superstructures, hulls, places for stowing and carrying such cargo, fittings, equipment, appliances, propulsive machinery, auxiliary machinery, and boilers thereof; and with respect to all materials used in such construction, alteration, or repair; . . ."

28. The U. S. Coast Guard's visual, air and water tests conducted and to be conducted in the inspection of the aforementioned barges do not comport with the Congressional statement of policy in 46 U.S.C.A. § 391a.(1), nor do such tests comport with Congress' mandate to the Secretary to establish rules and regulations for the protection of the marine environment and for vessel safety as provided for in 46 U.S.C.A. § 391a.(3).

29. If the methyl alcohol intended to be transported in the aforesaid barges should leak out of the barges there would be an extreme hazard to life and property due to the extreme flammability of the methyl alcohol and the likelihood of an explosion. Similarly, if methyl alcohol should leak out of the barges and into the water, its poisonous nature would create a hazard to the marine environment.

30. Thus, the final decision of the Commandant herein appealed from is:

a. Arbitrary;

b. Capricious;

c. An abuse of his discretion;

d. Not in accordance with law;

e. Without observance of procedure required by law; and

f. Unwarranted by the facts.

WHEREFORE, Inland prays that this Court:

(a) Reverse and set aside the August 13, 1976 final decision of the Commandant of the U. S. Coast Guard;

(b) Affirm the April 21, 1976 order of Commander Pitcock, as clarified by his May 28, 1976 order requiring NDT (nondestructive testing) of the barges which are the subject matter of this action;

(c) Grant Inland the relief sought in its appeal of May 19, 1976 with regard to broadening the scope of NDT to be required by the aforesaid orders of Commander Pitcock;

(d) Stay any action by the U. S. Coast Guard with respect to the barges which are the subject matter of this action so as to preserve the status and rights of Inland pending conclusion of this review proceeding, pursuant to 5 U.S.C.A. § 705; and

(e) Enter such other and further orders as to this Court may seem just and proper in the premises.

State of Missouri
County of St. Louis } ss.

JAMES F. DOWD, III, being first duly sworn upon his oath, hereby states that he is a Vice President of Inland Oil & Transport Co., that he has read the foregoing Complant, and that the allegations recited therein are true to the best of his knowledge, information and belief.

He further states that he is the agent of this corporation for the purposes of verifying the Complaint in this action.

INLAND OIL & TRANSPORT CO.
/s/ By JAMES F. DOWD, III

Subscribed and sworn to before me this 23rd day of August, 1976.

/s/ CLAUDINE J. SMITH
Notary Public

My commission expires March 24, 1980

(Seal)

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By ALLEN S. BOSTON
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St. Louis, Missouri 63101
314-231-5833
Attorneys for Plaintiff

Note: The Exhibits referred to in this Complaint as Exhibits A, B and D are not reprinted here as they were printed in full as Appendix D, E and F to Petition for Writ of Certiorari [A, 15-24]

APPENDIX B

United States District Court
Eastern District of Missouri
Eastern Division

Inland Oil & Transport Co.,
Plaintiff,
vs.
William T. Coleman, Jr., Secretary of Transportation,
and
Admiral Owen W. Siler, Commandant U. S. Coast Guard,
Defendants,
Dravo Corporation,
Defendant by Intervention.

Civil Action
No. 76-761C(2)

AFFIDAVIT IN SUPPORT OF MOTION OF DRAVO CORPORATION TO DISMISS COMPLAINT FOR JUDICIAL REVIEW OR FOR SUMMARY JUDGMENT

(Filed April 22, 1977)

Commonwealth of Pennsylvania
County of Allegheny } ss.

Comes now the affiant, J. L. Miller, having been duly sworn, and states the following:

1. I am General Contract Manager of the Engineering Works Division of Dravo Corporation and have served Dravo in various capacities for thirty-five years.

2. On November 15, 1976, pursuant to contract between Dravo Corporation and Inland Oil & Transport Co., Dravo tendered for delivery to Inland four (4) double skin tank barges identified as Dravo hulls 6617, 6618, 6619 and 6620.

3. Said barges have been certificated by the United States Coast Guard for carriage of Subchapter D cargoes including methyl alcohol.

4. On November 23, 1976, Inland Oil & Transport Co. rejected delivery of said barges.

5. Dravo considers Inland's rejection wrongful, considers Inland in breach of contract and has taken legal action in pursuit to remedy for said breach.

6. On February 18, 1977, Dravo entered into a contract for sale of hulls 6617, 6618 and 6620 to William B. Patton Towing Company of Friendswood, Texas. Delivery of said barges to Patton is scheduled for on or about April 22, 1977.

7. On April 21, 1977 Dravo entered into a contract for sale of hull 6619 to Thomas Marine Company of Butler, Pennsylvania. Delivery of said barge to Thomas Marine is scheduled for April 22, 1977.

FURTHER AFFIANT SAYETH NOT

I have read the foregoing Affidavit and, to the best of my information and belief, the statements contained therein are true and correct.

/s/ J. L. MILLER

Subscribed and sworn to before me this 21st day of April, 1977.

/s/ MARILYN N. VOGEL, Notary Public
Neville Township, Allegheny County
My Commission Expires Dec. 19, 1978
Member Pennsylvania Association of Notaries

APPENDIX C

[From Title 46, U.S.C.]

§ 391a. Vessels carrying certain cargoes in bulk

(1) Statement of Policy.—The Congress hereby finds and declares—

That the carriage by vessels of certain cargoes in bulk create substantial hazards to life, property, the navigable waters of the United States (including the quality thereof) and the resources contained therein and of the adjoining land, including but not limited to fish, shellfish, and wildlife, marine and coastal ecosystems and recreational and scenic values, which waters and resources are hereafter in this section referred to as the "marine environment."

That existing standards for the design, construction, alteration, repair, maintenance and operation of such vessels must be improved for the adequate protection of the marine environment.

That it is necessary that there be established for all such vessels documented under the laws of the United States or entering the navigable waters of the United States comprehensive minimum standards of design, construction, alteration, repair, maintenance, and operation to prevent or mitigate the hazards to life, property and the marine environment.

(2) Vessels included.—All vessels, regardless of tonnage size, or manner of propulsion, and whether self-propelled or not, and whether carrying freight or passengers for hire or not, which are documented under the laws of the United States or enter the navigable waters of the United States, except public vessels other than those engaged in commercial service, that shall have on board liquid cargo in bulk which is—

(A) inflammable or combustible, or

(B) oil, of any kind or in any form, including but not limited to petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil, or

(C) designated as a hazardous polluting substance under section 1162(a) of Title 33;

shall be considered steam vessels for the purposes of title 52 of the Revised Statutes of the United States and shall be subject to the provisions thereof: *Provided,* That (i) this section shall not apply to vessels having on board the substances set forth in (A), (B), or (C) above only for use as fuel or stores or to vessels carrying such cargo only in drums, barrels or other packages;

(ii) nothing contained herein shall be deemed to amend or modify the provisions of section 4 of Public Law 93-397 with respect to certain vessels of not more than five hundred gross tons;

(iii) this section shall not apply to vessels of not more than five thousand gross tons used in the processing and assembling of fishery products in the fisheries of the States of Oregon, Washington, and Alaska and such vessels shall be allowed to have on board inflammable or combustible cargo in bulk to the extent and upon conditions as may be required by the Secretary of the department in which the Coast Guard is operating, and

(iv) this section shall not apply to vessels of not more than five hundred gross tons documented in the service of oil exploitation which are not tank vessels and which would be subject to this section only because of the transfer of fuel from the vessels' own fuel supply tanks to offshore drilling or production facilities.

(3) Rules and Regulations.—In order to secure effective provision (A) for vessel safety, and (B) for protection of the marine environment, the Secretary of the department in which the Coast Guard is operating (hereafter referred to in this section as the "Secretary") shall establish for the vessels to which this

section applies such additional rules and regulations as may be necessary with respect to the design and construction, alteration, repair, and maintenance of such vessels, including, but not limited to, the superstructures, hulls, places for stowing and carrying such cargo, fittings, equipment, appliances, propulsive machinery, auxiliary machinery, and boilers thereof; and with respect to all materials used in such construction, alteration, or repair; and with respect to the handling and stowage of such cargo, the manner of such handling or stowage, and the machinery and appliances used in such handling and stowage; and with respect to equipment and appliances for life saving, fire protection, and the prevention and mitigation of damage to the marine environment; and with respect to the operation of such vessels; and with respect to the requirements of the manning of such vessels; and the duties and qualifications of the officers and crew thereof; and with respect to the inspection of all the foregoing. In establishing such rules and regulations the Secretary may, after hearing as provided in subsection (4), adopt rules of the American Bureau of Shipping or similar American classification society for classed vessels insofar as such rules pertain to the efficiency of hulls and the reliability of machinery of vessels to which this section applies. In establishing such rules and regulations, the Secretary shall give due consideration to the kinds and grades of such cargo permitted to be on board such vessel. In establishing such rules and regulations the Secretary shall, after consultation with the Secretary of Commerce and the Administrator of the Environmental Protection Agency, identify those established for protection of the marine environment and those established for vessel safety.

(4) Adoption of Rules and Regulations.—Before any rules or regulations, or any alteration, amendment, or repeal thereof, are approved by the Secretary under the provisions of this section, except in an emergency, the Secretary shall (A) consult with other appropriate Federal departments and agencies, and particularly with the Administrator of the Environmental Pro-

tection Agency and the Secretary of Commerce, with regard to all rules and regulations for the protection of the marine environment, (B) publish proposed rules and regulations, and (C) permit interested persons an opportunity for hearing. In prescribing rules or regulations, the Secretary shall consider, among other things, (i) the need for such rules or regulations, (ii) the extent to which such rules or regulations will contribute to safety or protection of the marine environment, and (iii) the practicability of compliance therewith, including cost and technical feasibility.

(5) Rules and Regulations for Safety; Inspection; Permits, Foreign Vessels.—No vessel subject to the provisions of this section shall, after the effective date of the rules and regulations for vessel safety established hereunder, have on board such cargo, until a certificate of inspection has been issued to such vessel in accordance with the provisions of title 52 of the Revised Statutes of the United States and until a permit has been endorsed on such certificate of inspection by the Secretary, indicating that such vessel is in compliance with the provisions of this section and the rules and regulations for vessel safety established hereunder, and showing the kinds and grades of such cargo that such vessel may have on board or transport. Such permit shall not be endorsed by the Secretary on such certificate of inspection until such vessel has been inspected by the Secretary and found to be in compliance with the provisions of this section and the rules and regulations for vessel safety established hereunder. For the purpose of such inspection, approved plans and certificates of class of the American Bureau of Shipping or other recognized classification society for classed vessels may be accepted as evidence of the structural efficiency of the hull and the reliability of the machinery of such classed vessels except as far as existing law places definite responsibility on the Coast Guard. A certificate issued under the provisions of this section shall be valid for a period of time not to exceed the duration of the certificate of inspection on which such permit is endorsed, and shall be subject

to revocation by the Secretary whenever he shall find that the vessel concerned does not comply with the conditions upon which such permit was issued: *Provided*, That rules and regulations for vessel safety established hereunder and the provisions of this subsection shall not apply to vessels of a foreign nation having on board a valid certificate of inspection recognized under law or treaty by the United States: *And provided further*, That no permit shall be issued under the provisions of this section authorizing the presence on board any vessel of any of the materials expressly prohibited from being thereon by subsection (3) of section 170 of this title.

(6) Rules and Regulations for Protection of the Marine Environment; Inspection; Certification.—No vessel subject to the provisions of this section shall, after the effective date of rules and regulations for protection of the marine environment, have on board such cargo, until a certificate of compliance, or an endorsement on the certificate of inspection for domestic vessels, has been issued by the Secretary indicating that such vessel is in compliance with such rules and regulations. Such certificate of compliance or endorsement shall not be issued by the Secretary until such vessel has been inspected by the Secretary and found to be in compliance with the rules and regulations for protection of the marine environment established hereunder. A certificate of compliance or an endorsement issued under this subsection shall be valid for a period specified therein by the Secretary and shall be subject to revocation whenever the Secretary finds that the vessel concerned does not comply with the conditions upon which such certificate or endorsement was issued.

(7) Rules and Regulations for Protection of the Marine Environment Relating to Vessel Design and Construction, Alteration, and Repair; International Agreement.—(A) The Secretary shall begin publication as soon as practicable of proposed rules and regulations setting forth minimum standards of design, con-

struction, alteration, and repair of the vessels to which this section applies for the purpose of protecting the marine environment. Such rules and regulations shall, to the extent possible, include but not be limited to standards to improve vessel maneuvering and stopping ability and otherwise reduce the possibility of collision, grounding, or other accident, to reduce cargo loss following collision, grounding, or other accident, and to reduce damage to the marine environment by normal vessel operations such as ballasting and deballasting, cargo handling, and other activities.

(B) The Secretary shall cause proposed rules and regulations published by him pursuant to subsection (7) (A) to be transmitted to appropriate international forums for consideration as international standards.

(C) Rules and regulations published pursuant to subsection (7) (A) shall be effective not earlier than January 1, 1974, with respect to foreign vessels and United States-flag vessels operating in the foreign trade, unless the Secretary shall earlier establish rules and regulations consonant with international treaty, convention, or agreement, which generally address the regulation of similar topics for the protection of the marine environment. In absence of the promulgation of such rules and regulations consonant with international treaty, convention, or agreement, the Secretary shall establish an effective date not later than January 1, 1976, with respect to foreign vessels and United States-flag vessels operating in the foreign trade, for rules and regulations previously published pursuant to this subsection (7) which he then deems appropriate. Rules and regulations published pursuant to subsection (7)(A) shall be effective not later than June 30, 1974, with respect to United States-flag vessels engaged in the coastwide trade.

(D) Any rule or regulation for protection of the marine environment promulgated pursuant to this subsection (7) shall be

equally applicable to foreign vessels and United States-flag vessels operating in the foreign trade. If a treaty, convention, or agreement provides for reciprocity of recognition of certificates or other documents to be issued to vessels by countries party thereto, which evidence compliance with rules and regulations issued pursuant to such treaty, convention, or agreement, the Secretary, in his discretion, may accept such certificates or documents as evidence of compliance with such rules and regulations in lieu of the certificate of compliance otherwise required by subsection (6) of this section.

(8) Shipping Documents—Vessels, subject to the provisions of this section shall have on board such shipping documents as may be prescribed by the Secretary indicating the kinds, grades, and approximate quantities of such cargo on board such vessel, the shippers and consignees thereof, and the location of the shipping and destination points.

(9) Officers; Tankermen; Certification.—(A) In all cases where the certificate of inspection does not require at least two licensed officers, the Secretary shall enter in the permit issued to any vessel under the provisions of this section the number of the crew required to be certified as tankermen.

(B) The Secretary shall issue to applicants certificates as tankermen, stating the kinds of cargo the holder of such certificate is, in the judgment of the Secretary, qualified to handle aboard vessels with safety, upon satisfactory proof and examination, in form and manner prescribed by the Secretary, that the applicant is in good physical condition, that such applicant is trained in and capable efficiently to perform the necessary operations aboard vessels having such cargo on board, and that the applicant fulfills the qualifications of tankerman as prescribed by the Secretary under the provisions of this section. Such certificates shall be subject to suspension or revocation on the same grounds and in the same manner and with like procedure as is

provided in the case of suspension or revocation of licenses of officers under the provisions of section 239 of this title.

(10) Effective Date of Rules and Regulations.—Except as otherwise provided herein, the rules and regulations to be established pursuant to this section shall become effective ninety days after their promulgation unless the Secretary shall for good cause fix a different time. If the Secretary shall fix an effective date later than ninety days after such promulgation, his determination to fix such a later date shall be accompanied by an explanation of such determination which he shall publish and transmit to the Congress.

(11) Penalties.—(A) The owner, master, or person in charge of any vessel subject to the provisions of this section, or any or all of them, who shall violate the provisions of this section, or the rules and regulations established hereunder, shall be liable to a civil penalty of not more than $10,000.

(B) The owner, master, or person in charge of any vessel subject to the provisions of this section, or any or all of them, who shall knowingly and willfully violate the provisions of this section or the rules and regulations established hereunder, shall be subject to a fine of not less than $5,000 or more than $50,000, or imprisonment for not more than five years, or both.

(C) Any vessel subject to the provisions of this section, which shall be in violation of this section or the rules and regulations established hereunder, shall be liable in rem and may be proceeded against in the United States district court for any district in which the vessel may be found.

(12) Injunctive Proceedings.—The United States district courts shall have jurisdiction for cause shown to restrain violations of this section or the rules and regulations promulgated hereunder.

(13) Denial of Entry.—The Secretary may, subject to recognized principles of international law, deny entry into the navi-

gable waters of the United States to any vessel not in compliance with the provisions of this section or the regulations promulgated thereunder.

As amended July 11, 1968, Pub.L. 90-397, § 4, 82 Stat. 341; July 10, 1972, Pub.L. 92-340, Title II, § 201, 86 Stat. 427, Nov. 16, 1973, Pub.L. 93-153, Title IV, § 401, 87 Stat. 589; Oct. 1, 1974, Pub.L. 93-430, § 6 (3), 88 Stat. 1183.

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In the Supreme Court of the United States

OCTOBER TERM, 1978

INLAND OIL & TRANSPORT CO., PETITIONER

v.

BROCK ADAMS, SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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1. Petitioner challenges the Coast Guard's inspection and certification of four barges to be used for the transportation of combustible liquids on the inland waterways of the United States. The district court dismissed petitioner's lawsuit for lack of jurisdiction and standing (Pet. App. A-1). The court of appeals affirmed, holding the case moot (Pet. App. A-2 to A-13; 575 F. 2d 184).

The court of appeals' opinion sets forth the factual and procedural background of this case (Pet. App. A-2 to A-10). Petitioner contracted to buy four barges from Dravo Corporation. One of the conditions of the contract was that the barges be inspected for safety defects, and

certified, by the Coast Guard as required by federal law. See 46 U.S.C. 391; 46 U.S.C. (Supp. V) 391a.[1] The Coast Guard inspected and certified the barges. Petitioner—apparently seeking to avoid its contractual obligation to accept the barges once they had been certified—was dissatisfied with the Coast Guard's inspection procedures and the resulting certification. After exhausting available administrative remedies within the Coast Guard, petitioner filed this suit. While the action was pending, petitioner rejected delivery of the four barges. Dravo then sold the barges to third parties and instituted a breach of contract action against petitioner in the United States District Court for the Western District of Pennsylvania. That case is pending.

The court of appeals held that the district court had jurisdiction under 28 U.S.C. 1331, but that when petitioner rejected delivery of the barges and they were sold to third parties, petitioner's claim against the Coast Guard became moot because petitioner had lost a direct stake in the adequacy of the Coast Guard's inspection procedures (Pet. App. A-10 to A-13). The court stated (Pet. App. A-11):

> When that sale took place, [petitioner's] controversy with the federal defendants ceased to exist from a practical standpoint, and [petitioner's] controversy with Dravo is pending in the federal court in Pennsylvania.

2. Petitioner's only contention here is that the court of appeals erred in concluding that petitioner no longer has a sufficient stake in the outcome to maintain its action against the Coast Guard (Pet. 5-8). Petitioner argues that it does have a sufficient stake in the outcome because "the

[1]These statutory provisions are reproduced at Pet. App. A-25 to A-31.

operation of the barges creates a substantial risk of harm to [petitioner] in the form of an explosion or cargo spill" (Pet. 5).[2] The court of appeals' rejection of that claim is correct, and in any event the case involves only the application of settled principles to particular facts. It does not warrant this Court's review.

As the court of appeals held, "the possibilities put forward by the [petitioner] are too indirect, remote and conjectural to defeat the claim of mootness" (Pet. App. 12a). Petitioner does not contend that the barges have been shown currently to contain defects; it asserts only that there may be defects that the Coast Guard failed to discover (see Pet. 3). Thus, petitioner could not suffer actual injury unless its vessels or personnel (1) come into contact with the Dravo barges somewhere on the vast inland waterway system, (2) at a time when the barges are loaded with dangerous cargo, (3) that is likely to explode or leak, (4) because of defects in the barges, (5) that the Coast Guard should have discovered during its inspection or in periodic future inspections and (6) that would have been discovered under different inspection procedures. Such a chain of speculation does not satisfy this Court's requirement of standing to sue. This Court repeatedly has held that a plaintiff must demonstrate "distinct and palpable injury" to himself, and a "fairly traceable" causal connection between the claimed injury and the challenged conduct. See, *e.g.*, *Duke Power Co.* v. *Carolina*

[2]Petitioner may have a stake in the outcome of this action in the sense that a determination that the Coast Guard's inspection was inadequate may assist it in defending against Dravo's breach of contract action in Pennsylvania. But, as the court of appeals noted, that is not a stake that gives substance to petitioner's lawsuit against the Coast Guard. If petitioner's real interest in the matter relates to its litigation with Dravo, the issues should be resolved in that litigation, not in a separate action against the Coast Guard.

Environmental Study Group, Inc., No. 77-262, decided June 26, 1978, slip op. 11; *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26; *Warth* v. *Seldin*, 422 U.S. 490. Petitioner's showing of harm as a river user fails to meet this standard.

Petitioner's reliance (Pet. 6-7) on *United States* v. *SCRAP*, 412 U.S. 669, is unwarranted. As this Court explained in *Simon* v. *Eastern Kentucky Welfare Rights Organization, supra*, 426 U.S. at 45 n. 25, *SCRAP* involved allegations of specific and perceptible harm that would befall the plaintiffs as a result of the challenged agency actions, and those allegations were sufficient to withstand a motion to dismiss although they might not have survived a motion for summary judgment. 412 U.S. at 689 and n. 15. In finding that the allegations were sufficient to support standing, the Court in *SCRAP* emphasized that "pleadings must be more than an ingenious academic exercise in the conceivable," and that a "plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by agency action." 412 U.S. at 688-689. In this case, in contrast, plaintiff's claim of possible injury amounts to little more than an ingenious exercise in the conceivable. And, as the Court reaffirmed in *Simon*, 426 U.S. at 44, "unadorned speculation will not suffice to invoke the federal judicial power."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

SEPTEMBER 1978.

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